

COUNTY OF MILWAUKEE
Inter-Office Communication

Date: May 5, 2008

To: Chairman Lee Holloway, Milwaukee County Board of Supervisors

From: Jerome J. Heer, Director of Audits

Subject: Release of Confidential Records and Processing of Open Records Requests
File No. 08-137)

Background

In February 2008, a newspaper article noted that Milwaukee County had released confidential court records to a private group that was developing a searchable database of County vendors on the group's internet website.

An adopted resolution (File No. 08-137) called for a review by the Department of Audit, in conjunction with Corporation Counsel, of the circumstances that led to the release of confidential court data and the County's current practices of handling requests under the Wisconsin Open Records Law to determine if improvements can be made. The resolution also questioned whether costs to provide the data had been properly reimbursed by the maker of the open records request that generated the current concerns.

Analysis

On December 28, 2007, the former Director of Administrative Services received an e-mail from Citizens for Responsible Government (CRG) requesting Milwaukee County accounts payable records. After a series of communications, a disc containing information on 188,000 payments for 2006 and 2007 was provided on January 23, 2008. A fee was not charged for the records. Between the date of the request and the delivery of the disc, documents indicate that there were three competing pressures. First, there was an effort to be timely in responding to the request. Second, there was an effort to ensure that confidential information was not released. Third, there was a need to respond to the request without disrupting the year-end work that is associated with the County's financial cycles.

By February 5, the information was posted on the Internet by the CRG and the Acting Director of Administrative Services informed affected department heads that the information had been posted. Upon hearing from the Clerk of Circuit Courts on February 8, that confidential information had been posted on the website, a series of efforts was undertaken over the next several days with the cooperation of CRG to redact the sensitive information. The information that was eventually removed from the Internet included data that identified parties involved in juvenile, paternity and mental health proceedings.

Several questions arise from the manner in which this open records request was handled:

- Which records can be made available for public review and which are shielded from public disclosure?
- How did confidential information end up on the Internet?
- Who is the custodian of the information that was posted?
- How can Milwaukee County avoid the release of confidential information in the future?

- Have the costs of providing this data been reimbursed by the requestor to the extent permitted by law?

Which records can be made available for public review and which are shielded from public disclosure?

According to guidance issued by the State of Wisconsin Attorney General, information falls into one of three categories: absolute right of access, absolute denial of access and subject to a balancing of public and private interests. Examples of records that generally fall into the category where access is to be denied include social security numbers, information related to a current investigation, and health care records.

How did confidential information end up on the Internet?

The data that was released to the CRG was from automated accounts payable records. The source of information contained in the accounts payable records is usually manual documents submitted as support for a payment. With Courts payments, examples of such documents include Affidavits Regarding Fees and Expenses, Claim for Independent Psychological Evaluation Fees and Invoices for Court Reporter Transcript Preparation. Each of these documents may contain information that is shielded from release under the Wisconsin Open Records Law and Milwaukee County Ordinances. However, Accounts Payable staff often enters the details into the description field of payment records. Vendors sometimes need this level of detail in the payment records because it helps them to more readily track the specific case that is linked to the payment.

When DAS was responding to the CRG request it did conduct a review of the description fields. Many records were redacted including Human Services data that might contain confidential information. However, with over 180,000 disbursements in the file, DAS did not detect every instance in which data was not appropriate for release. Nor did DAS have each custodian of original payment documents conduct such a review until after the file had been put on the Internet.

Who is the custodian of the information that was posted?

Because the information that was posted was from DAS Accounts Payable, the custodian of those records is DAS. However, the sources of the documents entered in the Accounts Payable system are the operating departments that generated payments and those departments remain the custodians of the source documents. Regardless of who is the legal custodian, the standard for protecting shielded information is the same.

How can Milwaukee County avoid the release of confidential information in the future?

With regard to payment information, one major step to achieving transparency without sacrificing the need for confidentiality would be the development of description and invoice data that is not identifiable by client. DAS and operating departments would undoubtedly want to work with vendors to ensure that they would still be able to track payments back to their invoices without the need to contact Accounts Payable staff. As for other information, each department has different data and each handles open records requests differently. To our knowledge, there has been no effort to train County employees on this matter in recent years.

Have the costs of providing this data been reimbursed by the requestor to the extent permitted by law?

The CRG was not charged a fee for the records it was given. According to DAS, the time spent on the request was minimal with the exception of the cost of redacting data. DAS estimates that about \$370 of staff time was spent on responding to the request. Staff time may be an allowable charge if it is actual, necessary and direct. However, much of this time was focused on redacting confidential information. The Wisconsin Attorney General has ruled that the cost of redacting records for public release cannot be passed on to the requestor. State Statutes and Milwaukee County Ordinances also authorize the waiver or reduction of fees where the authority deems that it is in the public interest to do so (see section 56.29 (4)(c) 5 –attached).

At the time of this request, Milwaukee County was in the process of implementing an “Expenditure Accountability Project” to present similar information via the County web portal. This clearly represents a determination that providing the information via the Internet would serve a public interest. Data on the CRG website indicates that some of its costs were covered by the Sam Adams Foundation, the National Taxpayers Union and Citizens in Charge. In addition, individuals accessing the CRG website are given information on how to provide charitable donations to support the project.

This situation raises a policy question about charging a fee for information that meets, or in the judgment of an administrator meets, the public interest provision of Milwaukee County Ordinances (Section 56.29 (4)(c) 5). In the course of this review, we also discussed the threshold for charging a fee given that it can cost between \$5 and \$10 to process the receipt of a payment.

Conclusions and Recommendations

All parties involved in this matter agree that the release of confidential information and the ultimate posting of that information on the Internet is not acceptable. There are several things that Milwaukee County can do to minimize the likelihood of such an occurrence in the future. These steps, if undertaken, could also build on this experience to provide greater transparency of County expenditures and streamline the use of resources needed to respond to inquiries.

1. The definition of records custodian needs to be clarified and communicated to all staff. In those instances where data exists in more than one agency, a protocol should be developed to ensure communication between those agencies when a request for records is processed.
2. Milwaukee County Ordinances Section 56.29 (4)(c) 5 should be clarified to provide better direction to the custodians of records on when it is in the public interest to waive or reduce a fee. A minimum fee level should also be set. According to DAS, a threshold of 50 pages is warranted given the expense associated with processing a payment at the current price of \$.15 per page. Given the current prevalence of automated data, a similar threshold should be considered for electronic information.
3. The consequences of publicly releasing confidential information are severe. Therefore, a Countywide initiative, including training, is needed to provide clarity and consistency in the processing of open records requests. Because of its expertise in this subject, it is appropriate that the Office of Corporation Counsel take the lead in this effort. While we do not know the volume of open records requests that are made of County administrators, it is likely that increasing the activity of Corporation Counsel in training and advising staff on this matter will result in the need for additional resources in that office.

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4. Transparency of government operations has become an issue with the media, individual citizens and groups. As a result, this type of information will be, and has been, made available at non-County websites. It is appropriate to consider more direct involvement in providing the public with such information so that Milwaukee County government can ensure not only that the information is accurate and timely but also that it is legal to make it public.

The Office of Corporation Counsel was consulted throughout the preparation of this review.

Please refer this report to the Committee on Finance and Audit.

Jerome J. Heer

JJH/cah

cc: William Domina, Corporation Counsel
Steve Cady, Fiscal & Budget Analyst, County Board Staff
Delores Hervey, Chief Committee Clerk, County Board Staff
Cynthia Archer, Acting Director, Department of Administrative Services
Scott Walker, Milwaukee County Executive
John Barrett, Clerk of Circuit Courts

Milwaukee County Ordinances
Section 56.29. Access to Public Records.

1. Definitions.

- (a) "Authority" means any of the following having custody of a record: an office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; or a formally constituted subunit of the foregoing.
- (b) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes) and computer printouts. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his/her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

2. Legal custodians.

- (a) Every department head of every unit of county government, including all boards and commissions, is the legal custodian of his/her records and the records of his/her office, but the official may designate an employee of his/her staff to act as the legal custodian.
- (b) Each legal custodian shall name a person to act as legal custodian in his/her absence or the absence of his/her designate. This subsection does not apply to members of the county board.
- (c) The designation of a legal custodian does not affect the powers and duties of the county clerk and county government under other statutes and ordinances, notwithstanding the provisions of § 19.21 et seq., Wis. Stats.

3. Procedural information. Pursuant to § 19.34, Wis. Stats., and the guidelines therein listed, the county clerk shall adopt, prominently display and make available for inspection and copying at its offices for the guidance of the public, a notice containing a description of the county organization and the established times and places at which each legal custodian from whom and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the cost thereof. Each legal custodian shall similarly adopt and display a notice reciting the time and places for inspection and costs involved in obtaining copies. The county clerk shall also prominently display at its offices, for the guidance of the public, a copy of §§ 19.31--19.39, Wis. Stats. This section does not apply to members of the county board.

4. Access to records; fees.

- (a) The rights of any person who requests inspection or copies of a record are governed by the provisions and guidelines of § 19.35(1), Wis. Stats.
- (b) Each authority and/or legal custodian shall provide any person who is authorized to inspect or copy a record which appears in written form pursuant to § 19.35(1)(b), Wis. Stats. or any person who is authorized to and requests permission to photograph a record the form of which does not permit copying pursuant to § 19.35(1)(f), Wis. Stats.,

with facilities comparable to those used by its employees to inspect, copy, and abstract the record during established office hours. An authority and/or legal custodian is not required by this subsection to purchase or lease photocopying, duplicating, photographic, or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

- (c)
 - 1. Each authority and/or legal custodian shall impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by the law. For the purpose of implementing and collecting the actual, necessary and direct cost of reproduction and transcription of a record a uniform fee is established in an amount of fifteen cents (\$0.15) for each page of letter size or legal size documents except that when any statute, ordinance or resolution provides for a different fee, such fee shall be observed and collected.
 - 2. Each authority and/or legal custodian shall impose a fee upon the requester of a copy of a record for the actual, necessary and direct cost of photographing and photographic processing if the authority and/or legal custodian provides a photograph of a record, the form of which does not permit copying.
 - 3. Except as otherwise provided by law or as authorized to be prescribed by law, an authority and/or legal custodian shall impose a fee upon a requester for locating a record, not exceeding the actual necessary and direct cost of location, if the cost is fifty dollars (\$50.00) or more.
 - 4. Each authority and/or legal custodian shall impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.
 - 5. An authority and/or legal custodian may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.
 - 6. Each authority and/or legal custodian shall require prepayment by a requester of any fee(s) imposed under this subsection if the total amount exceeds five dollars (\$5.00).
- (d) Each authority and/or legal custodian in acting upon a request for any record shall respond within the times and according to the procedures set out in § 19.35(4), Wis. Stats.
- (5) Separation of information. If a record contains information that may be made public and information that may not be made public, the authority and/or legal custodian having custody of the record shall provide the information that may be made public and delete the information that may not be made public from the record before release. Each authority and/or legal custodian shall consult with the county corporation counsel before releasing any information under this subsection. Notwithstanding the foregoing, records of the following personnel matters are generally not public and should not be disclosed to the public without prior consultation with the corporation counsel:
 - (a) Evaluations of applicants.
 - (b) Names of applicants other than those certified for employment.
 - (c) Pay survey data obtained from identifiable nonpublic employers.
 - (d) Names of nonpublic employers contributing pay survey data.
 - (e) Performance evaluations of individual employees.

In addition, all patient health care records shall remain confidential and are nonpublic, and may be released only to persons in accordance with the provisions of §§ 146.82 and 905.04, Wis. Stats.